



BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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JUL 11 2014

BOB STUMP, Chairman  
GARY PIERCE  
BRENDA BURNS  
BOB BURNS  
SUSAN BITTER SMITH

DOCKETED BY

In the matter of  
  
Michael J. Blake (CRD# 2022161), a  
married man.  
  
Respondent.

DOCKET NO. S-20898A-13-0395

SECURITIES DIVISION'S POST-HEARING  
BRIEF

Hearing Dates: April 22 and 23, 2014

Assigned to Administrative Law  
Judge Marc E. Stern

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its post-hearing brief with respect to the administrative hearing held on April 22 and 23, 2014 as follows:

**A. SUMMARY.**

Michael J. Blake was a registered securities salesman who consented to a one-year suspension and a \$10,000 fine with the self-regulatory organization ("SRO") Financial Industry Regulatory Authority (FINRA) because he participated in private securities transactions and failed to provide prior written notice to his employer in violation of NASD Conduct Rules 3040 and 2110, provided false and incomplete information on compliance questionnaires and failed to update and correct his outside business disclosure forms in violation of NASD Conduct Rule 2110, and failed to provide prior written notice of an undisclosed limited liability company in violation of NASD Conduct Rules 3030 and 2010.

The Securities Act and Investment Management Act provides this Commission with statutory grounds to revoke Mr. Blake's registration as a securities salesman and to deny his May

1 15, 2013, salesman application and October 2, 2013, investment adviser representative application  
2 because he is subject to a FINRA bar or suspension of greater than six months. In general, under  
3 the Securities Act A.R.S. § 44-1962(A)(8) and the Investment Management Act A.R.S. § 44-  
4 3201(A)(10), the Commission may revoke, suspend, or deny an individual's registration or  
5 licensing application with the Commission, if that individual has been suspended by FINRA for a  
6 period of greater than six months. Under A.R.S. § 44-3201(A)(10) of the Investment Management  
7 Act, the Commission need also find that a revocation, suspension, or denial be in the public  
8 interest; however, the Commission need not re-litigate the underlying securities violations that  
9 caused Mr. Blake to be suspended by FINRA.<sup>1</sup> The public interest requirement is met by  
10 recognizing other regulatory punishments and orders, articulating the concerns of allowing Mr.  
11 Blake to back-door his way to the same clients he is prohibited from conducting securities services  
12 for by the FINRA suspension, and seeking to deter future violations.

13 A revocation of Mr. Blake's securities salesman registration and denial of his applications  
14 would acknowledge the punishment meted out by other regulatory agency actions, just as they  
15 recognize and acknowledge this Commission's actions and orders. Furthermore, the public interest  
16 is served and protected since it ensures that Mr. Blake could not back-door his way into managing  
17 the financial portfolios of the **same** clients that FINRA has suspended him from transacting  
18 securities for. Using the statutory grounds to revoke and deny the registration and licenses of  
19 securities violators is appropriate; otherwise, such violators could remove any deterrence effect of  
20 other agency penalties by changing jurisdictions. It could erode the public trust if this Commission  
21 allowed individuals to bypass a suspension by another state or federal regulator merely by seeking  
22 a different industry title or moving to Arizona from a different jurisdiction. This concern is real  
23 since investment adviser representatives are generally held to a *higher* standard of care, commonly  
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26 <sup>1</sup> See *In the Matter of Kaye, Real & Co. Inc.*, 1955 WL 43169, 36 S.E.C. 373 (1955) (In determining the question of whether it is in the public interest to revoke registration, Commission is not required to re-litigate factual assertions on which injunctions constituting statutory grounds for revocation were based).

1 referred to as a fiduciary standard, for their clients since they manage or oversee the client's entire  
2 financial picture versus just a single transaction.<sup>2</sup>

3 Finally, a review of applicable case law and statutes confirm that Mr. Blake is a salesman  
4 and broker, within the meaning of the Arizona statutes and federal definitions. The Arizona  
5 Securities Act and IM Act provisions at issue here are not invalidated merely because they  
6 reference a federal term used in the securities industry. Otherwise, the literal reading suggested by  
7 Respondent's Counsel would make the Arizona statutes unnecessary and inapplicable in all  
8 instances.

9 The issues presented in this matter that are in dispute between the parties are: (1) under the  
10 IM Act, is the public interest met by acknowledging another regulator's punishment and ensuring  
11 that a work-around to the FINRA suspension does not occur since a violator can apply to be an  
12 investment advisor representative on a state level because FINRA does not have statutory oversight  
13 of investment advisor representatives; and (2) does the Securities Act and the IM Act apply to Mr.  
14 Blake, since the term broker is a federal term that broadly encompasses any individual engaged in  
15 the business of effecting transactions in securities for others? The answer to both questions is yes  
16 since the public interest is best served by revoking and denying his registration and licensing  
17 applications pending before the Division and the statutes, when properly read in their entirety,  
18 apply to Mr. Blake.

### 19 **B. JURISDICTION.**

20 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona  
21 Constitution, the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities Act") and the  
22 Investment Management Act of Arizona, A.R.S. § 44-3101 *et seq.* ("IM Act").  
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25 <sup>2</sup> See *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 17, 100 S. Ct. 242, 246 (1979)(citing *Santa*  
26 *Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11, 97 S. Ct. 1292, 1300 (1977)( investment advisors are  
regulated under the Investment Advisers Act of 1940, which establishes 'federal fiduciary standards' to  
govern the conduct of investment advisers).

1       **C. FACTS.**

2           From March 9, 2000, to April 3, 2013, Mr. Blake was registered as a securities salesman  
3 with the Commission, CRD# 2022161.<sup>3</sup> As a registered securities salesman, Mr. Blake was  
4 required to comply with rules and regulations to maintain his registration status. Between  
5 November 1, 2002, to June 30, 2006, Mr. Blake was registered as a securities salesman with  
6 Carillon Investments, Inc., CRD# 14646, (“Carillon”). Carillon was a registered securities dealer  
7 federally and with the state of Arizona, and was a federally registered Investment Adviser (“IA”)  
8 and was notice-filed as an IA in Arizona.

9           Around June 30, 2006, Carillon was acquired by Ameritas Investment Corporation, CRD#  
10 14869, (“Ameritas”). Mr. Blake became registered as a securities salesman with Ameritas.  
11 Ameritas is a registered securities dealer, federally and with the state of Arizona. On March 21,  
12 2013, FINRA initiated an investigation on Mr. Blake for possible industry violations.<sup>4</sup> Mr. Blake  
13 retired from Ameritas Investment Corporation on March 28, 2013, while the FINRA investigation  
14 was still unresolved.<sup>5</sup>

15           In May 2013, Mr. Blake joined a new brokerage firm, Mid Atlantic Capital Corporation,  
16 (“MACC”) as a securities salesman and applied to the Division for approval.<sup>6</sup>

17           On August 29, 2013, Mr. Blake submitted an offer of settlement to FINRA to resolve the  
18 allegations of industry violations.<sup>7</sup> On September 9, 2013, FINRA accepted the offer of settlement  
19 with Mr. Blake in Disciplinary Proceeding No. 2010021710501.<sup>8</sup> FINRA concluded that the offer  
20 of settlement was in the public interest, were sufficiently remedial to deter future misconduct, and  
21 represented a proper discharge by FINRA of its regulatory responsibility under the Securities and  
22 Exchange Act of 1934. Mr. Blake consented to the following sanctions and fines: (a) a one-year  
23 suspension in all capacities from associating with any FINRA member firm; (b) a \$10,000 fine; and

24 <sup>3</sup> Exs. S-1 & S-2a.

25 <sup>4</sup> Ex. S-2b.

26 <sup>5</sup> Ex. S-2a.

<sup>6</sup> Id.

<sup>7</sup> Ex. S-21c.

<sup>8</sup> Ex. R-14.

1 (c) that the sanctions shall be effective on the date set by FINRA staff. FINRA staff specified Mr.  
2 Blake's timeframe of suspension was October 7, 2013, to October 6, 2014, wherein he may not be  
3 associated with any FINRA member in any capacity, including clerical or ministerial functions  
4 (hereafter "FINRA suspension").<sup>9</sup> As a result of the FINRA suspension, Mr. Blake was unable to  
5 work at MACC and he terminated his employment with them in October 2013.

6 On October 2, 2013, Mr. Blake began employment with Mid Atlantic Financial  
7 Management, Inc. ("MAFM"), which is a federally registered IA and IA notice-filer in Arizona.  
8 MAFM is *not* a FINRA member firm. Mr. Blake filed an application for licensure with the  
9 Division to become a licensed investment adviser representative with MAFM to provide  
10 investment advisory services in Arizona.<sup>10</sup>

11 On November 19, 2013, the Securities Division filed a Notice of Opportunity for Hearing  
12 regarding a proposed order to cease and desist and order of denial ("Notice"). The Notice sought  
13 revocation of Mr. Blake's registration as a securities salesman and the denial of Mr. Blake's  
14 subsequent applications as a securities salesman and investment adviser representative. Mr. Blake  
15 was, and still is, subject to the FINRA suspension.

16 On April 22 and 23, 2014, a final evidentiary hearing was held before Administrative Law  
17 Judge Marc E. Stern ("ALJ Stern"). Division exhibits S-1 through S-34(c) were admitted into  
18 evidence. Respondent exhibits R-1 through R-26 were admitted into evidence.

#### 19 **D. LEGAL ARGUMENTS.**

20 **I. THE COMMISSION HAS BROAD DISCRETION IN DETERMINING**  
21 **THAT A DENIAL OF MR. BLAKE'S INVESTMENT ADVISER REPRESENTATIVE**  
22 **APPLICATION IS IN THE PUBLIC INTEREST. SUCH A DENIAL WOULD**  
23 **ACKNOWLEDGE ANOTHER REGULATOR'S PUNISHMENT AND PREVENT MR.**  
24 **BLAKE FROM OBTAINING ACCESS TO HIS PROHIBITED CLIENTS BY MEANS OF**  
25 **A BACK-DOOR.**

26 Under the Securities Act, the Commission need only determine that Mr. Blake is subject to  
a FINRA suspension of greater than six months – which he is; however, the IM Act imposes one

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<sup>9</sup> Id.

<sup>10</sup> Ex. S-1.

1 additional factor. Under A.R.S. § 44-3201(A), the Commission must also find that a denial of Mr.  
2 Blake's investment adviser representative application is in the public interest. There is no need to  
3 re-litigate the underlying facts that resulted in Mr. Blake's FINRA suspension. *See In the Matter of*  
4 *Kaye, Real & Co. Inc.*, 1955 WL 43169, 36 S.E.C. 373 (1955) (In determining the question of  
5 whether it is in the public interest to revoke registration, Commission is not required to re-litigate  
6 factual assertions on which injunctions constituting statutory grounds for revocation were based).

7       There is no single test or explicit definition of the term "public interest" in the Arizona  
8 statutes. The case law states that "the 'public interest' standard is obviously very broad, requiring  
9 that the Commission consider the full range of factors bearing on the *judgment* about sanctions that  
10 the expert agency ultimately must render. *Blinder, Robinson & Co., Inc. v. S.E.C.*, 837 F.2d 1099,  
11 1110 (D.C. Cir. 1988)(emphasis in original). The *Blinder* Court went on to further state, "[o]ur  
12 holding in this respect should by no means be interpreted as forcing the SEC to engage in an open-  
13 ended inquiry without metes and bounds. It has not been argued to us, and we fail to see how it  
14 reasonably could be, that the matter of *Blinder, Robinson's* relationship with counsel was irrelevant  
15 to the choice of sanctions imposed under the securities laws. Be that as it may, **nothing that we**  
16 **say should be taken to cabin the broad discretion that agencies such as the SEC enjoy in**  
17 **determining what evidence is germane to the determination of the 'public interest.'**" *Id.* at  
18 Fn12. (emphasis added). The factors germane to the public interest here is the underlying  
19 suspension, preventing the applicant from circumventing his FINRA suspension, and needing to  
20 deter future misconduct.

- 21       1. The public interest is met by acknowledging another regulator's punishment and the  
22 underlying facts that caused resulted in that punishment. Otherwise, there is an  
23 opportunity for an individual to skirt the assessed penalty by seeking a different  
industry title or moving to Arizona from a different jurisdiction.

24       A denial of Mr. Blake's investment adviser representative application would acknowledge  
25 the punishment assessed by FINRA for Mr. Blake's violations of industry rules. In addition, it  
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1 would prevent Mr. Blake from bypassing a FINRA suspension by means of a back-door method –  
2 by becoming an investment adviser representative, which is not regulated by FINRA.

3       When a party is materially suspended by another SRO or securities agency, the statutes  
4 provide the Commission with the statutory power to revoke, deny, or suspend a license to  
5 acknowledge the actions of relevant agencies or regulators. Without such acknowledgement,  
6 violators could start anew by simply moving to another state or location. For example, it could  
7 allow individuals to evade this Commission’s orders and actions if they moved from the state to  
8 conduct securities transactions and the other regulatory agencies failed to acknowledge this  
9 Commission’s orders and actions.

10       It is well settled by the federal case law that investment advisers are held to a fiduciary  
11 standard of conduct in their dealings with customers. On the federal level, brokers are regulated  
12 under the Securities and Exchange Act of 1934 (the “Exchange Act”) and investment advisers are  
13 regulated under the Investment Advisers Act of 1940 (the “Advisers Act”), which are two different  
14 regulatory schemes. Federal case law has held that “§ 206 [of the Advisers Act] establishes  
15 ‘federal fiduciary standards’ to govern the conduct of investment advisers.” *See Transamerica*  
16 *Mortgage Advisors v. Lewis*, 444 U.S. 11, 17, 100 S. Ct. 242, 246 (1979)(citing *Santa Fe*  
17 *Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11, 97 S. Ct. 1292, 1300 (1977)). The fiduciary  
18 standard seeks to “eliminate, or at least to expose, all conflicts of interest which might incline as  
19 investment adviser – consciously or unconsciously - to render advice which was not disinterested.”  
20 *Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192, 84 S. Ct.  
21 275, 282-283 (1963). (*See also S.E.C. v. Moran*, 922 F. Supp. 867 S.D.N.Y. (1996) (“Section 206  
22 of Advisers Act establishes statutory fiduciary duty for investment advisers to act for benefit of  
23 their clients, requiring exercise of utmost good faith in dealing with clients, which extends beyond  
24 obligation to not make misrepresentations or material omissions. Investment Advisers Act of 1940,  
25 § 206, 15 U.S.C.A. § 80b-6.”)).

1 Contrast that with brokers who are held to a “suitability” standard set forth by FINRA in  
2 Rule 2111 and approved by the SEC. FINRA Rule 2111 – Suitability states:

3 “(a) A member or an associated person must have a reasonable basis to believe that a  
4 recommended transaction or investment strategy involving a security or securities is  
5 suitable for the customer, based on the information obtained through the reasonable  
6 diligence of the member or associated person to ascertain the customer's investment profile.  
7 A customer's investment profile includes, but is not limited to, the customer's age, other  
8 investments, financial situation and needs, tax status, investment objectives, investment  
9 experience, investment time horizon, liquidity needs, risk tolerance, and any other  
10 information the customer may disclose to the member or associated person in connection  
11 with such recommendation.”

12 The suitability requirement is short-lived because it ends with the execution of a securities trade.  
13 *See Walston & Co. v. Miller*, 100 Ariz. 48, 51-52, 410 P.2d 658, 661 (1966)(The agency  
14 relationship between customer and broker normally terminates with the execution of the order  
15 because the broker's duties, unlike those of an investment advisor or those of a manager of a  
16 discretionary account are only to fulfill the mechanical, ministerial requirements of the purchase or  
17 sale of the security or future contracts on the market). For salesmen, Arizona imposes the similar  
18 suitability standard of conduct. Pursuant to A.A.C. R14-4-130(A)(4), it would be dishonest and  
19 unethical for salesman to recommend to a client “the purchase, sale or exchange of any security  
20 without reasonable grounds to believe that the recommendation is suitable for the customer. Such  
21 suitability shall be determined on the basis of information furnished by the customer after such  
22 inquiry as may be necessary under the circumstances, concerning the customer’s investment  
23 objectives, financial situation and needs, and other information known by the person making the  
24 recommendation.” This language is very similar to FINRA’s suitability rule 2111.

25 Thus, salesmen and brokers need to ensure their recommendations are suitable for their  
26 customers, not that the recommendations are in the customers’ best interests. Understanding that

1 investment advisers are held to a higher standard – a fiduciary standard – is important since Mr.  
2 Blake states he does not plan to be a registered salesman again but seeks approval to become an  
3 investment adviser representative. An individual who was unable to uphold the required salesman  
4 standard of conduct should not be allowed to obtain a license as an investment adviser  
5 representative, which is viewed as requiring a higher standard of conduct.

6 Mr. Blake's former employer determined he violated firm policy and assessed a 30 day  
7 suspension, a monetary fine of \$2,500, an in-person compliance conference and training on outside  
8 business activities and private securities transactions, and prohibited any new activities from being  
9 conducted through any entity established for real estate transactions, including Longest Drive,  
10 LLC. Respondent Counsel argued this punishment, along with the FINRA suspension, is  
11 sufficient; however, the Commission should not rely on a firm to mete out the appropriate  
12 punishment, as Mr. Blake suggests. Such a punishment does not address the fact that Mr. Blake is  
13 still under a FINRA suspension.

14 If Mr. Blake's investment adviser representative application was granted, it would allow  
15 Mr. Blake to back-door his way into managing the financial affairs of clients, many of whom could  
16 be his past securities clients that FINRA has prohibited him from conducting any type of securities  
17 transaction for. FINRA cannot directly prohibit Mr. Blake from conducting investment adviser  
18 services to the same securities clients. Mr. Blake should not be allowed to bypass a FINRA  
19 prohibition by merely taking on a different industry title of investment adviser representative. Yet,  
20 that would be the outcome because FINRA does not have regulatory oversight over investment  
21 adviser representatives – the states do.

22 2. A denial and revocation of Mr. Blake's registration and licensing applications with  
23 the Commission will deter future misconduct.

24 When an industry standard is violated, a suspension or denial is warranted to deter future  
25 misconduct. The FINRA order found that suspending Mr. Blake from conducting securities  
26 transactions was in the public interest and sufficiently remedial to deter him from any future

1 misconduct.<sup>11</sup> To allow Mr. Blake access to the same set of clients, while still under a FINRA  
2 suspension, weakens a statutory right provided to the Commission to address such conduct based  
3 on a prior SRO action. A denial and revocation would ensure to the public that violations of  
4 industry standards will be penalized consistently among public and regulatory agencies to deter  
5 future misconduct. Otherwise, any deterrence effect could be nullified merely by moving  
6 jurisdictions.

7 Mr. Blake also argued that the public needs no protection from him since he has suffered  
8 enough and that an investment advisory firm is ready and willing to employ him. The ability to  
9 provide the public a guide (i.e. those who violate industry standards may be revoked or denied) and  
10 to ensure consistency of punishment between regulatory regimes outweigh the desire of an  
11 investment advisory firm's willingness to take on Mr. Blake because of his potential to help them  
12 make money with his book of business. Though broadly defined, "the use of the words 'public  
13 interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather,  
14 the words take meaning from the purposes of the regulatory legislation." *See Nat'l Ass'n for*  
15 *Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 669, 96 S. Ct. 1806, 1811,  
16 (1976). The statutory purpose is to punish, deter, and prevent securities violations. Revoking and  
17 denying Mr. Blake's licensing applications – especially since he is still subject to a FINRA  
18 suspension, best serves the purpose of the statute.

19 The fact remains that at this time and under these specific facts and circumstances, Mr.  
20 Blake should be denied as a salesman and as an investment adviser representative.

21 **II. THE COMMISSION SHOULD REVOKE MR. BLAKE'S**  
22 **REGISTRATION AND DENY HIS OUTSTANDING LICENSING APPLICATIONS**  
23 **BECAUSE HE IS SUBJECT TO A FINRA SUSPENSION GREATER THAN SIX**  
24 **MONTHS. THE SECURITIES ACT AND IM ACT APPLY TO MR. BLAKE SINCE HE**  
25 **FITS SQUARELY WITHIN THE ARIZONA DEFINITION AND FINRA DEFINITION**  
26 **OF SALESMAN AND BROKER.**

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<sup>11</sup> Ex. R-14 p.8.

1 In an effort to avoid the application of Arizona's statutes, Respondent's Counsel argued that  
2 the term "broker" is not defined in the Securities Act or IM Act, his client was not a broker since  
3 FINRA never licensed him as a broker - therefore, those statutes are inapplicable here.<sup>12</sup> A look at  
4 applicable case law and statutes disproves this argument.

5 The Securities Act and IM Act statutes are not invalid merely because it does not provide a  
6 definition of the term broker in the statutes. If the use of the term "broker" in the statute nullified  
7 its application to Mr. Blake, it would be a superfluous statute since it would not apply to anyone.  
8 The statute cannot be read in such a manner to make it useless. Courts "presume that the  
9 legislature does not enact superfluous or reiterative legislation." *Phoenix Newspapers, Inc. v. Dep't*  
10 *of Corr., State of Ariz.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (Ct. App. 1997). The Arizona  
11 statutes incorporate the federal definition of the term broker. Arizona courts can also look to  
12 federal courts for guidance in interpreting state securities statutes. *See Nutek Information Systems,*  
13 *Inc. v. Arizona Corp. Comm'n.*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (Ariz. App. 1998). *See also*  
14 *1966 Ariz. Sees. Laws. ch. 197, § 11(C)* (stating that the courts may use as a guide the  
15 interpretations given by the SEC and federal courts in construing substantially similar provisions in  
16 the federal securities laws). Moreover, A.R.S. § 44-3102 states that "[i]n interpreting ... other  
17 terms and phrases used in this chapter [chapter 13 – Investment Management], the commission  
18 may refer to identical terms or phrases in the investment advisers act of 1940 and investment  
19 company act of 1940 including regulations or interpretive releases promulgated under those acts  
20 and chapter 12 of this title and any rules adopted under that chapter."

21 The Arizona statutes need to be read in their entirety and coupled with the federal  
22 definitions and case law, it confirms that the terms salesman and broker refer to the same  
23 individual. A.R.S. §§ 44-1962 and 44-3201 applies to an individual who is currently registered or  
24 licensed as a securities salesman or investment advisor representative or is applying to become  
25 registered or licensed as one. A.R.S. § 44-1962(A)(8) reads as follows:

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<sup>12</sup> Hr'g Tr. Vol. I pp.22-23.

1           “The salesman is subject to an order of an administrative tribunal, an SRO or the SEC  
2           denying, suspending or revoking membership or registration as a broker or dealer in  
3           securities or an investment adviser or investment adviser representative for at least six  
4           months.”<sup>13</sup>

5           The first part of the statute uses to the term “salesman,” which the parties agree that Mr. Blake was  
6           during his employment with Carillion and Ameritas. As conceded by Mr. Blake’s attorney, “[h]e  
7           was suspended [by FINRA] as a salesman basically.”<sup>14</sup> A salesman is defined in the Securities Act  
8           as “an individual, other than a dealer, employed, appointed or authorized by a dealer to sell  
9           securities in this state.”<sup>15</sup> Mr. Blake was registered as a securities salesman in Arizona during the  
10          relevant time, was employed by securities dealers, sold securities in the State of Arizona, and  
11          therefore was a salesman within the meaning of the statutes.<sup>16</sup>

12           By the plain reading of the federal statute and rule, Mr. Blake is a broker within that  
13          definition. The term “broker” is used in the statute to identify a salesman by the term used by the  
14          SEC and FINRA. The terms salesman and broker are not mutually exclusive, they are just  
15          different terms used by the State and the federal agencies to describe an individual who transacts in  
16          securities. FINRA defines a broker as “any individual, corporation, partnership, association, joint  
17          stock company, business trust, unincorporated organization, or other legal entity engaged in the  
18          business of effecting transactions in securities for the account of others, but does not include a  
19          bank.”<sup>17</sup> The SEC also defines a broker in a similar manner. “The term ‘broker’ means any person  
20          engaged in the business of effecting transactions in securities for the account of others.” *See* the  
21          Exchange Act of 1934, Section 3(a)(4)(A), 15 U.S.C.A. 78c(a)(4)(A).

22  
23          <sup>13</sup> A.R.S. § 44-3201(A)(10) is nearly identical and reads “The investment adviser or investment adviser  
24          representative is subject to an order of an administrative tribunal, an SRO or the SEC denying, revoking or  
25          suspending membership, licensure or registration as a broker or dealer in securities or as an investment  
26          adviser or investment adviser representative for at least six months.”

<sup>14</sup> Hr’g Tr. Vol. I. p.24 lns. 17-18.

<sup>15</sup> A.R.S. § 44-1801(22).

<sup>16</sup> Exs. S-1, S-2, S-3.

<sup>17</sup> Ex. R-19; FINRA Article I Definitions (e).

1 Even if we looked beyond the plain reading of the federal statute and rule, the case law  
2 reveals that it is the actions of the individual that defines him, not the term or title used. “The terms  
3 ‘broker’ and ‘dealer’ are words of art, with a specific meaning both in the industry and to those  
4 members of Congress intimately involved in the drafting of securities legislation. Section 3(a)(4) of  
5 the 1934 Act, 15 U.S.C. § 78c(a)(4) defines a broker as any person engaged in the business of  
6 effecting transactions in securities for the account of others, but does not include a bank. Section  
7 3(a)(5) of the 1934 Act, 15 U.S.C. s 78c(a)(5) defines a dealer as any person engaged in the  
8 business of buying and selling securities for his own account, through a broker or otherwise, but  
9 does not include a bank.... Both definitions connote a certain regularity of participation in  
10 securities transactions at key points in the chain of distribution.” *See Massachusetts Fin. Servs.,*  
11 *Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976) *aff'd*, 545 F.2d 754 (1st  
12 Cir. 1976). Mr. Blake played a key role in the private securities transactions that were the subject  
13 of the FINRA suspension. In addition, as a registered salesman he placed or conducted various  
14 securities transactions for his clients.

15 Further, the terms “engaged in the business of” and “effecting transactions” have been  
16 broadly construed since they are not defined by FINRA or in the Exchange Act. In *S.E.C. v. Offill*,  
17 2012 WL 246061, \*7 (N.D.Tex.) (2012), that court noted that:

18 “Section 15 of the Exchange Act does not define the phrase ‘engaged in the business.’  
19 Various courts have described the conduct that constitutes being ‘engaged in the business’  
20 of ‘effecting transactions in,’ or ‘buying and selling,’ securities. One court has held that  
21 ‘regularity of participation is the primary indicia of being engaged in the business.’ *SEC v.*  
22 *Kenton Capital, Ltd.*, 69 F.Supp.2d 1, 12 (D.D.C.1998). Regularity of participation can be  
23 shown by ‘such factors as the dollar amount of securities sold ... and the extent to which  
24 advertisement and investor solicitation were used.’ *Id.* at 12–13; *See also Mass. Fin. Servs.*  
25 *Inc., v. Sec. Investor Prot. Corp.*, 411 F.Supp. 411, 415 (D.Mass.1976) (“Both definitions  
26

1 connote a certain regularity of participation in securities transactions at key points in the  
2 chain of distribution.”), *aff'd*, 545 F.2d 754 (1st Cir.1976).”

3  
4 The court went on to further state that:

5 “The Exchange Act likewise does not define ‘effecting transactions’ for the purposes of  
6 being a broker. In determining whether a person ‘effected transactions,’ courts consider  
7 several factors, such as whether the person (1) solicited investors to purchase securities, (2)  
8 was involved in negotiations between the issuer and the investor, and (3) received  
9 transaction-related compensation. *SEC v. Earthly Mineral Solutions, Inc.*, 2011 WL  
10 1103349, at \*3 (D.Nev. Mar.23, 2011) (*citing SEC v. Hansen*, 1984 WL 2413 (S.D.N.Y.  
11 Apr.6, 1984)); *see also SEC v. U.S. Pension Trust Corp.*, 2010 WL 3894082, at \*21  
12 (S.D.Fla. Sept.30, 2010) (compiling list of 11 factors courts consider when determining  
13 whether someone is a broker).”<sup>18</sup> *Id.*

14 Therefore, the term “broker” is broad and it encompasses the activities of Mr. Blake. Mr. Blake  
15 conducted securities transactions for his clients, offered and sold securities, and received  
16 compensation as part of his regular employment as a securities salesman to transact securities for  
17 Ameritas and/or Carillion investment clients. He also testified that he provided investment  
18 advisory services to many of the same clients.<sup>19</sup>

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21 <sup>18</sup> “In determining whether a person has acted as a broker, several factors are considered. These factors  
22 include whether the person: 1) actively solicited investors; 2) advised investors as to the merits of an  
23 investment; 3) acted with a ‘certain regularity of participation in securities transactions’; and 4) received  
24 commissions or transaction-based remuneration.” *SEC v. Corporate Relations Group, Inc.*, No. 99-CV-  
25 1222, 2003 WL 25570113, at \*17 (M.D. Fla.2003) (*citing In re Kemprowski & the Cambridge Consulting*  
26 *Co.*, Exchange Act Release No. 34-35058, 1994 WL 684628, at \*2 (Dec. 8, 1994)). Courts have also  
considered whether the alleged broker 5) is an employee of the issuer; 6) is selling, or previously sold, the  
securities of other issuers; 7) is involved in negotiations between the issuer and the investor; 8) analyzes the  
financial needs of an issue; 9) recommends or designs financing methods; 10) discusses the details of  
securities transactions; and 11) makes investment recommendations.” *SEC v. U.S. Pension Trust Corp.*,  
2010 WL 3894082, at \*21.

<sup>19</sup> Hr’g Tr. Vol.I, p.143.

1           The Arizona statutes A.R.S. §§ 44-1962(A)(8) and 44-3201(A)(10) recognize the federal  
2 term used, but in no way alters the application of the statute to Mr. Blake. The FINRA order  
3 suspended him as a broker, which is the applicable term used and defined by FINRA for a  
4 salesman under the Securities Act. The FINRA order suspends Mr. Blake's registration and  
5 prohibits him from conducting any securities activity with any FINRA member firm for one year.  
6 There is nothing confusing about the suspension or the applicable statutes.

7           Next, the statute requires that Mr. Blake be subject to an order of an SRO (FINRA) that  
8 denied, suspended, or revoked his membership or registration for at least six months. At the time  
9 of the hearing and this brief, Mr. Blake was still subject to a one-year FINRA suspension regarding  
10 his membership and registration with them. The suspension is specific to Mr. Blake and it  
11 prohibits him from associating with any FINRA member firm for one year. Thus, he is "subject  
12 to" a FINRA order suspending his membership or registration for greater than six months.

13           Mr. Blake being subject to an order barring his association as a broker with all FINRA  
14 member firms fits the definition of the applicable statute. The use of the term "broker" in the  
15 Securities Act and IM Act does not alter its application to Mr. Blake in this matter. As a result, this  
16 Commission can revoke Mr. Blake's salesman registration and deny his May 15, 2013, registration  
17 application as a securities salesman with the Commission pursuant to A.R.S. § 44-1962.

18       **E. CONCLUSION.**

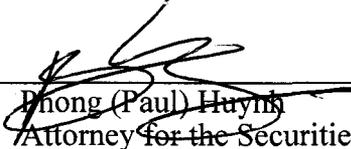
19           The Division requests that the Commission revoke Mr. Blake's registration as a securities  
20 salesman and to deny his May 15, 2013, salesman application and October 2, 2013, investment  
21 adviser representative application because he is subject to a FINRA bar or suspension of greater  
22 than six months. A revocation of Mr. Blake's securities salesman registration and denial of his  
23 application would acknowledge another regulator's punishment. Further, denying Mr. Blake's  
24 investment adviser representative application is in the public interest since it ensures that he could  
25 not back-door his way into managing the financial portfolios of the same clients that FINRA has  
26 suspended him from transacting securities for. Revoking, denying, or suspending securities

1 industry violators would further the deterrence objective of the legislature since violators would be  
2 unable to avoid the effect of another agency's penalty by merely changing jurisdictions. Since Mr.  
3 Blake fits squarely within the meaning of the terms salesman and broker, the statutory grounds  
4 needed to revoke, suspend, and deny Mr. Blake's registration as a salesman and applications as a  
5 salesman and investment adviser representative are met. Revoking and denying Mr. Blake's  
6 licensing applications – especially since he is still subject to a FINRA suspension, best serves the  
7 purpose of the statutes.

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9  
10 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of July, 2014.

11 ARIZONA CORPORATION COMMISSION

12  
13 By \_\_\_\_\_

  
Phong (Paul) Huynh  
Attorney for the Securities Division of the  
Arizona Corporation Commission

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